Sumo Container Station, Inc. d/b/a Sumo Airlines *and* Teamsters Local Union No. 25, affiliated with International Brotherhood of Teamsters, AFL–CIO. Cases 1–CA–29985 and 1–CA–30236

May 10, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

On December 30, 1993, Administrative Law Judge Walter H. Maloney issued the attached decision. The Respondent filed exceptions, a supporting brief, and an answering brief. The General Counsel filed cross-exceptions, a supporting brief, and an answering brief. The Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order as modified.

1. We adopt the judge's findings that the Respondent's questioning of its employees was unlawful. In doing so, we note that under *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985), and *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), the Board employs a ''totality of circumstances'' test to determine if an interrogation would reasonably tend to restrain, coerce, or interfere with employees in the exercise of their statutory rights. Applying that test, we agree with the judge's conclusion that Boston Manager Scarlett's interrogations of the drivers and dispatching employees for approximately a week preceding the discharges of those employees violated Section 8(a)(1).

Scarlett was the highest ranking manager at the Respondent's Boston warehouse. Further, in most instances, the repeated and systematic interrogations were accompanied by threats of closure and by other statements which gave the impression of surveillance and which solicited grievances.[3] With respect to over-the-road driver Warren, the interrogation was followed within minutes by that employee's unlawful discharge. Additionally, unlike *Rossmore House*, supra, there is no evidence in the record that the employees questioned were open and active union supporters at the time of the interrogations. Finally, Scarlett questioned some of the employees as to whether they had heard any rumors about union activities at the warehouse. Thus, this questioning was not limited to seeking information about the questioned employees' own union activity, but additionally sought to elicit information about other employees' union activities. It is well established that interrogating an employee regarding the union sentiments of others is unlawful. See, e.g., *Cumberland Farms*, 307 NLRB 1479 (1992). Thus, considering all the circumstances, we adopt the judge's findings of unlawful interrogations.

2. The Respondent argues that the judge improperly found that Scarlett unlawfully solicited grievances and engaged in conduct which gave employees the impression their union activities were under surveillance when these theories had not been alleged or argued by the General Counsel. We find merit in this argument.

The complaint alleged, and we find, that certain statements made by the Respondent's manager, Scarlett, constituted unlawful interrogations, informing employees that it would be futile to select the Union, and threatening employees with plant closure, in violation of Section 8(a)(1). The General Counsel did not allege any other independent violations of Section 8(a)(1). Nevertheless, the judge found that other statements made by Scarlett, made in the same conversations as the statements alleged and found to be unlawful, constituted unlawful solicitation of grievances and

[1] We deny the Respondent's requests to disqualify the judge and for oral argument on that issue, consistent with the judge's prior ruling on a similar motion. The Respondent contends that the judge erred in refusing to disqualify himself for ex parte communications. In support, the Respondent submitted sworn affidavits to the effect that the judge made a statement to the discriminatees about a pending settlement offer. The Respondent asserts that the judge thereby misstated the terms of its settlement offer in a manner calculated to cause employees to reject it. Assuming, without deciding, that the judge made such a statement, we do not find it a basis for disqualifying him. As the General Counsel noted in his answering brief, the statement allegedly made by the judge concerned the settlement of the case and therefore falls within the purview of Sec. 102.130 of the Board's Rules and Regulations specifically permitting an administrative law judge to engage in ex parte communications in connection with settlement proposals. Moreover, there is no evidence that the allegedly improper conversation in any way involved the merits of the complaint allegations. We therefore find without merit the Respondent's contention that the judge's conduct showed prejudice and bias. Thus, we perceive no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias against the Respondent in his analysis or discussion of the evidence. Accordingly, we find no basis on which to disqualify the judge.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We further correct the following factual error made by the judge, which does not affect his decision. Contrary to the judge, there is no evidence that Respondent President Evangelista's accountant is his cousin.

[3] As noted infra, we find that there is a procedural impediment to a conclusion that the impression of surveillance and the solicitation of grievances were themselves unlawful. We rely upon them, however, as part of the ''totality of circumstances'' properly considered in determining whether the interrogations were coercive. See *Sunnyvale*, supra.

conduct which gave employees the impression their union activities were under surveillance.

We find that the complaint not only failed to allege these matters with particularity, but also that there was no paragraph of the complaint which could be construed as reasonably comprehending them. Thus, this case is unlike *Graham-Windham Services*, 312 NLRB 1199 (1993), in which the Board found that an unlawful promise was reasonably comprehended by a complaint allegation referring to solicitations of grievances and implicit promise to remedy them. It is also distinguishable from *Azalea Gardens Nursing Center*, 292 NLRB 683 fn. 2 (1989), in which the Board, in rejecting a party's exception concerning an alleged variance between the nature of a complaint allegation and the violation found, noted that the particular statement which was the basis for the 8(a)(1) finding at issue had been specifically alleged in the complaint.

We also find it significant that the General Counsel in this case moved to amend the complaint with regard to another specific allegation but failed to make a comparable motion during the hearing to amend the complaint with regard to the statements at issue here. This conduct signaled that these statements would not be considered as separate violations and, further, the General Counsel failed to argue for such findings in his posthearing brief to the judge. Under these circumstances, we cannot find that the Respondent was on notice that these statements would be sought by the General Counsel or considered by the Board as separate violations of the Act. In light of all the above, we reverse the judge's findings of unlawful solicitation of grievances and impression of surveillance and we shall modify the judge's recommended Order accordingly.

3. The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging various employees. The Respondent excepts to the findings based on the judge's failure to include a *Wright Line* analysis in his reasoning. 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). We adopt the judge's findings. In doing so, we note that, although the judge did not explicitly analyze the discharges with reference to *Wright Line*, supra, his findings are consistent with that decision. As to the discharges, the judge essentially found a prima facie case of discriminatory conduct and considered and rejected as invalid the Respondent's proffered defense to the allegation that its actions were unlawful. Also see *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

In adopting the judge in this regard, we specifically note the strong prima facie case of discriminatory intent as demonstrated by the numerous unlawful interrogations, threats of plant closure and discharge, statements that it would be futile for employees to select the Union and creating the impression the employees' union activities were under surveillance, attempts to induce the employees to withdraw from the Union, and solicitation of grievances. We also note that the Respondent's threats of plant closure and discharge occurred within a week of the discharges at issue and immediately following its receipt of the Union's representation petition. As to the Respondent's defense, we note that, as detailed by the judge, its financial problems were of long standing, that it offered no documentation to support its assertion that its president had decided to take action to discharge the employees before it became aware of the employees' union activities and the representation petition, and that the judge discredited Evangelista's and Scarlett's testimony concerning the timing of the discharges. In these circumstances, we find that the Respondent failed to rebut the General Counsel's prima facie case.[4]

4. The General Counsel excepted to the judge's failure to include in his reinstatement and make-whole remedy relief for employee Davis and other part-time employees affected by the Respondent's transfer of bargaining unit work from the Boston warehouse. We find no merit to the General Counsel's exception.

The complaint alleged that seven employees were terminated because of the transfer of unit work. The complaint specifically named seven employees, and Davis was not among them. The complaint did not allege discrimination against either a class of individuals or unnamed individuals who were situated similarly to named individuals. Further, the parties stipulated that, if the separate Boston unit were found appropriate, it would include only the seven named discriminatees. The unit was so confined. Concededly, Davis may legally be part of that unit and, thus, the General Counsel could have alleged him as a discriminatee and sought a remedy as to him. The General Counsel, however, in the complaint and in the stipulation with the Respondent, chose to omit him from consideration. Thus, we find it unwarranted to extend the remedy to reach Davis or any other employees who may be in the same posture.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and

[4] In adopting the judge's finding that the discharges were discriminatory and rejecting the Respondent's economic defense, we decline to rely on his statement implying that the Respondent's financial situation was in part attributable to the amount of Evangelista's salary. We also note that the letter sent to Evangelista by his accountant, submitted by the Respondent to explain the timing of its action and quoted in part by the judge, was dated November 12, 1992, the same month as the discharges and before any evidence indicating the Respondent knew of any union activities. Contrary to the Respondent's assertions, however, that letter, standing alone, is insufficient to establish that it would have discharged the employees at the time it did absent their union activities.

orders that the Respondent, Sumo Container Station, Inc. d/b/a Sumo Airlines, Boston, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(f) from the judge's Order and reletter the subsequent paragraphs accordingly.

2. Substitute the following for relettered paragraph 1(g).

''(g) Since November 27, 1992, refusing to recognize and bargain collectively in good faith with Teamsters Local Union No. 25, affiliated with International Brotherhood of Teamsters, AFL–CIO as the exclusive representative of its Boston-based full-time and regular part-time drivers, warehousemen, and dispatchers, exclusive of office clerical employees, managers, guards, and supervisors as defined in the Act.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT coercively interrogate employees concerning their union activities and the union activities of other employees.

WE WILL NOT tell employees that it would be futile for them to engage in union activities or to select a collective-bargaining representative.

WE WILL NOT threaten to close the terminal or to discharge employees because they have engaged in union activities.

WE WILL NOT tell employees that it would be impossible for them to obtain reinstatement because they had engaged in union activities.

WE WILL NOT inform employees that the terminal had been closed because they had engaged in union activities.

WE WILL NOT discourage membership in or activities on behalf of Teamsters Local Union No. 25, affiliated with International Brotherhood of Teamsters, AFL–CIO, or any other organization by discharging employees, transferring bargaining unit work to others outside the bargaining unit, conditioning reinstatement upon withdrawing membership from the Union, failing to pay employees severance pay or failing to offer them employment in another facility, or by otherwise discriminating against employees in their hire or tenure.

WE WILL NOT refuse to recognize and bargain collectively in good faith with Teamsters Local Union No. 25, affiliated with International Brotherhood of Teamsters, AFL–CIO as the exclusive collective-bargaining representative of our Boston-based full-time and regular part-time drivers, warehousemen, and dispatchers, exclusive of office clerical employees, managers, guards, and supervisors as defined in the Act.

WE WILL NOT unilaterally transfer bargaining unit work to others outside the bargaining unit or unilaterally discharge bargaining unit employees.

WE WILL NOT by any other means or in any other manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed to them by Section 7 of the Act.

WE WILL offer to Joseph M. Warren, Dennis P. Sheehan, Matthew Sarno, Kathryn Pettis Mogan, Charles Lloyd, Ronald Dearden, and Stephen Rea full and immediate reinstatement to their former or substantially equivalent employment, without prejudice to their seniority or to other rights previously enjoyed, and WE WILL make them whole for any loss of pay or benefits suffered by them by reason of the discriminations found herein, with interest.

WE WILL reestablish the entire business operation at our East Boston, Massachusetts terminal, and WE WILL restore the work formerly performed at that location before bargaining unit employees were terminated.

WE WILL recognize and bargain collectively with Teamsters Local Union No. 25, affiliated with International Brotherhood of Teamsters, AFL–CIO as the exclusive collective-bargaining representative of all full-time and regular part-time drivers, warehousemen, and dispatchers employed at our East Boston, Masschusetts terminal, exclusive of office clerical employees, managers, guards and supervisors as defined in the Act.

SUMO CONTAINER STATION, INC. D/B/A
SUMO AIRLINES

Erica F. Crystal and *Kathleen McCarthy, Esqs*., for the General Counsel.

Gary H. Kreppel, Esq., of Framingham, Massachusetts, for the Respondent.

Matthew E. Dwyer, Esq., of Boston, Massachusetts, *Lou DiGiampaolo*, Field Representative, and *Richie E. Reardon*, Recording Secretary, of Boston, Massachusetts, for the Charging Party.

DECISION

FINDINGS OF FACT

A. *Statement of the Case*

WALTER H. MALONEY, Administrative Law Judge. This case came on for hearing before me at Boston, Massachusetts, upon a consolidated amended unfair labor practice

complaint, issued by the Regional Director for Region 1,[1] which alleges that the Respondent, Sumo Container Station, Inc. d/b/a Sumo Airlines[2] violated Section 8(a)(1), (3), and (5) of the Act. More particularly, the amended consolidated complaint alleges that the Respondent repeatedly interrogated its employees concerning their union activities, told employees that it would be futile for them to join a union, threatened to close the Boston terminal if employees unionized, and also told its discharged employees that reinstatement would be impossible because they had become unionized, although suggesting that employees might try to obtain reinstatement by disavowing their union affiliations. The General Counsel also alleges that the Respondent discharged seven named employees at its Boston terminal because they had signed union cards and had conditioned their reinstatement upon disavowing further interest in the Union. She further alleges that the Respondent failed to offer discharged Boston employees jobs at its New York facility and failed to give them 2 months' severance pay because of their union sympathies and activities. The Respondent is also charged with unlawfully refusing to bargain with the Charging Party as the exclusive representative unit and with discharging employees without first bargaining with the Union over the work transfer. The General Counsel alleges that the appropriate unit is one limited to the Boston terminal while the Respondent contends that the bargaining unit should include at least its New York-based employees and possibly those employed by it in other cities further south. Respondent denies the commission of the unlawful acts alleged above and asserts that it discharged employees and transferred unit work because it was suffering a business reversal and had to economize. Upon these contentions the issues herein were joined.[3]

B. *The Unfair Labor Practices Alleged*

Respondent operates a bonded container station and trucking operation.[4] Its sole stockholder and president is Anthony Evangelista. Evangelista takes an active hands-on role in the management of the business. For the past 15 years or so, Respondent has maintained its business from a warehouse located near John F. Kennedy International Airport (JFK) in New York, where its principal office is located. In addition to the Boston operation, at issue in this case, Respondent has facilities at Secaucus, New Jersey, where maritime cargo is picked up and delivered, and small offices at Raleigh-Durham, North Carolina, and Atlanta. Respondent's principal customers are foreign airlines, such as Japanese Air Lines (JAL), Alitalia, and Aer Lingus, who do not have landing rights at both Logan and JFK. Incoming foreign freight at JFK is trucked to Boston by the Respondent, where it is delivered to customs brokers who process cargo through customs into the American market. Freight for export originating in the Boston area—and in particular, fish—is collected from customers. Sometimes freight was assembled at the Respondent's Boston warehouse and from there trucked to various foreign airlines at JFK for shipment overseas. Local trucking, which takes place mostly within the confines of the respective airports, was handled by Respondent's drivers both at JFK and at Logan. Until the events in this case arose, Respondent had separate dispatching facilities at both airports and separate complements of drivers.

In the 1980s, Michael Scarlett, now the manager of the Respondent's Boston warehouse, owned Friends Air Freight, Inc. which delivered freight from JFK principally for a customer known as Northeast Shuttle. Scarlett relocated his operation from New York to a warehouse near Logan International Airport (Logan) and from that point it delivered freight to and from JFK under the name Skymasters. When Scarlett could not make a go of Skymasters, Evangelista, acting on behalf of the Respondent, entered into an oral understanding with Scarlett pursuant to which the Respondent took over Skymasters' vehicle leases and business accounts and carried on Skymasters' business as part of its own. At that time Skymasters had about 20 employees. Respondent offered jobs to all of them and kept Scarlett to manage the Boston facility.

In the fall of 1992, when the events in this case arose, there were slightly more than 20 over-the-road drivers employed in New York, in addition to 3 or 4 owner-operators. A few more employees worked in the dispatch operation, doing local cartage, or in the New York warehouse. New York-based drivers also made round trips from JFK to the Respondent's southern terminals as did drivers based in those cities.[5] Respondent employed five employees at Secaucus, two at Raleigh-Durham, and two in Atlanta. (The Atlanta warehouse is now closed.) Through attrition the size of the Boston operation was gradually reduced to five over-the-road drivers, two employees engaged in dispatch or local driving, and two others in the office, including Scarlett. The Boston operation also employed two or three regular part-time employees who held other jobs but were called upon to help out on busy days.[6] Most Boston to New York runs began about 4 p.m. Depending upon delays en route and problems en-

[1] The principal docket entries in this case are as follows:

Charge filed by Teamsters Local No. 25, affiliated with International Brotherhood of Teamsters, AFL–CIO (the Union) against the Respondent in Case 1–CA–29985 on December 1, 1992, and amended on December 21, 1992; charge filed by the Union against the Respondent in Case 1–CA–30236 on February 23, 1993; consolidated complaint issued against the Respondent by the Regional Director for Region 1, on May 25, 1993; Respondent's answer filed on September 3, 1993; hearing held in Boston, Massachusetts, on October 18–20, 1993; briefs filed with me by the General Counsel and the Respondent on or before December 17, 1993.

[2] The Respondent admits, and I find, that it is a corporation which maintains an office and place of business in East Boston, Massachusetts, where it is engaged in the business of transporting a limited class of freight by truck. In the course and conduct of its business, the Respondent annually derives gross revenues in excess of $50,000 for the transportation of freight from points and places located in the Commonwealth of Massachusetts directly to points and places located outside the Commonwealth. Accordingly, the Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[3] Corrections in the transcript have been noted and corrected.

[4] Bonded freight is imported freight which has not yet cleared U.S. Customs.

[5] There is no evidence that any Boston drivers other than Dearden ever made any over-the-road trips other than between Boston and New York. Dearden's trips to Secaucus or Philadelphia were only on an occasional basis.

[6] Actually, some of the full-time unit employees held other jobs and were able to take New York runs because their assignments were scheduled in order to accommodate their other employment.

countered at JFK, a round trip could be completed in about 12 hours. For a round trip they were paid a flat $140.

Both at Boston and New York, the Company operated with leased equipment. It owned some trailers but leased all of its tractors from Salem Truck Leasing in Brooklyn, which performed all but the most incidental truck maintenance. These tractor-trailers were also used for local pickups and deliveries in and about the two airports. New York-based drivers were paid $10 per hour on Boston runs and on a mileage basis when they traveled south. Owner-operators were paid on a mileage basis. None of the Respondent's employees have ever been unionized.

In mid-November 1992, James M. Warren, an over-the-road driver based in Boston, met on two or three occasions with Jack Murray, an organizer for the Charging Party, and discussed the unionization of the Boston terminal. He obtained about 10 union designation cards from Murray and gave them to Dennis Sheehan, a local city driver, and Kathryn (Pettis) Mogan, a dispatcher, with a request that they distribute the cards to other employees. Warren spent most of his time driving between Boston and New York and rarely saw other employees. Warren signed his card on November 20. Four other employees—Sheehan, Mogan, Charles G. Lloyd, and Stephen A. Rea—signed on the same day. Two employees, Matthew Sarno and Ronald Dearden, signed their cards on Monday, November 23. These cards were returned to Warren, who in turn gave them to Murray. On Wednesday, November 25, the Union filed a representation petition in the Boston Regional Office (Case 1–RC–19910). On Friday, November 27, the petition was served upon Scarlett at the Boston terminal.

During the week preceding their discharges or on the day of their discharge, several employees were questioned by Scarlett concerning the Union drive and their participation in it. I credit the employee accounts of these conversations, most of which were not challenged by Respondent witnesses.[7] On November 30, Warren, who had been with the Boston operation since its inception, called the office to see when his regular run was going to be ready to leave. On this occasion, Scarlett asked him if he had filled out a union card. Warren replied that he had done so, whereupon Scarlett replied, ''I'll get back to you in ten minutes.'' When they spoke again by phone a few minutes later, Scarlett told Warren that his services would no longer be needed but gave him no reason for the discharge.

Sheehan, acting at Warren's request, signed a card himself and signed up five other employees. On November 27, Scarlett approached Sheehan at the terminal about noon and asked him if he had heard any rumors about a union. Sheehan replied that he had not heard anything. Scarlett went on to say that someone in the New York office had called to say that they had heard such rumors in New York but Sheehan reiterated that he had not heard anything. Scarlett asked again, ''Are you sure?'' and again Sheehan said, ''Yes.'' A while later on the same day, Scarlett saw Sheehan in the men's room at the terminal and asked again if Sheehan had heard any union rumors. Sheehan said he had heard nothing, whereupon Scarlett told him, ''Well, you know what would happen? Tony [Evangelista] would shut this operation down immediately.'' Sheehan replied, ''That's [his] prerogative. I have to go to work,'' and left. On a third occasion that day, Scarlett approached Sheehan with the statement that ''Tony's heard some rumors.'' Again Sheehan replied that he had not heard anything. Later the same afternoon, when over-the-road driver Stephen A. Rea reported for work, Scarlett asked Rea, in Sheehan's presence, ''if Rea had heard anything about a union coming in.'' Both employees asserted that they had not. A few minutes later, while Sheehan was getting ready to hook up the New York-bound trailers, Scarlett again asked both Sheehan and Rea, ''Listen, off the record, did you guys sign any cards or . . . hear any[thing about a] union?'' Both replied again that they had not. A few minutes later, Scarlett volunteered to both employees that ''he,'' meaning Tony Evangelista, would close down the operation ''in a minute'' if the Union came in.

Matthew Sarno, once an over-the-road driver, worked principally in and around the Boston office doing local driving, warehouse work, and dispatching. On Wednesday, November 25, when he went to Scarlett to get his check, Scarlett asked Sarno if he had heard anything about a union coming into the terminal. Sarno replied that he had not, whereupon Scarlett asked Sarno if he had signed a union card. Sarno replied that he had done so. Scarlett then said to Sarno, ''I wish you guys had come to see me first. None of this would have happened.'' He went on to tell Sarno that he had been talking with Evangelista 2 weeks' earlier to see if he could get the Boston employees ''a couple of bucks across the board.'' Sarno's reply was that his effort was ''a little late.'' Scarlett then told Sarno that ''Anthony [would] shut the doors and turn the operation around,'' insisting that the Boston operation was just a ''convenience'' for him.

Kathryn (Pettis) Mogan had worked about 1-1/2 years for the Boston terminal as a dispatcher. On or about November 27, Scarlett asked her if she had heard anything about a union coming into the operation. She replied, ''No.'' He went on to say that union activities would never be allowed in the terminal, that Tony would never go for it, and that he would close down the operation if it happened. Scarlett also told her that he wished that she had come to see him first. Scarlett directly asked Mogan if she had signed a card; she denied doing so.

Sometime after signing a card on November 20, over-the-road driver Charles G. Lloyd was approached at the Boston warehouse by Scarlett and was asked if he had heard any union talk. Lloyd replied that he had. Scarlett then asked him if he had signed a card. Lloyd replied in the affirmative to this question, whereupon Scarlett remarked that Lloyd was the only one who had told him the truth. Lloyd informed Scarlett that he had signed a card in order to get more money and some fringe benefits. Scarlett replied that he had tried for 2 years to get some benefits for Boston employees.[8]

Shortly before he was discharged, over-the-road driver Ronald Dearden was asked by Scarlett if he had signed a union card. Before Dearden answered, Scarlett went on to

[7] Scarlett made generalized denials that he ever threatened employees with loss of jobs or closing the terminal. He made no specific denials of the testimony of the several employees who testified in support of the amended complaint. Scarlett never denied engaging in interrogation of employees nor was he questioned on this point. I discredit his denials.

[8] Neither Boston nor New York employees receive any health insurance or any form of retirement or insurance benefits. Drivers in Boston do not receive holiday pay although office personnel do.

say, ''You don't have to answer that if you don't want to but I don't want you to lie to me.'' Dearden then informed Scarlett that he had signed a card. Then they began to talk about company benefits, or the lack thereof, at which time Scarlett said, ''I don't blame you but you should have come to me first.'' During his testimony, employee Rea corroborated the evidence, recited above, which Sheehan gave concerning Scarlett's joint questioning of these employees. In addition to corroborating Sheehan's testimony, Rea added that Scarlett told them that he had heard from Evangelista in New York that if employees signed union cards, he would terminate the operation because, if the Boston operation went union, Evangelista was afraid that all the other operations would go union.

On Friday, November 27, the representation petition in Case 1–RC–19910 arrived in the mail at the Boston office from the Board, as did a letter from the Union claiming majority status and demanding recognition. Scarlett informed Evangelista by phone that it had arrived. Evangelista asked him who had signed it and was informed that a ''majority'' had done so. He then told Scarlett that the New York drivers would transport the freight formerly hauled by Boston drivers and that Air General, the Respondent's Boston landlord, would do the freight handling at the Boston terminal.

On Monday, November 30, Scarlett, acting on instructions from Evangelista, informed each of the seven discriminatees that they had been fired. In addition to his statement to Warren, recited above, Scarlett told Sheehan, who normally left work at 5 or 6 p.m., that he could punch out at 2 p.m. Scarlett added that his services would not be needed any longer and that he could come back next week and pick up his paycheck when he turned in his security badge. No reason was given for the discharge.

When Sarno reported to the terminal that day, he was instructed to report to Scarlett's office. Upon walking into the office, he immediately asked Scarlett, ''Can I withdraw?'' adding that he did not want to lose his job. Scarlett replied that his offer was ''too late.'' When Sarno asked Scarlett if that meant he was fired, Scarlett replied that it did and told Sarno to go downstairs and ''collect.'' Scarlett went on to say that the Boston office was just a ''convenience'' for Evangelista and that he was probably going to shut the doors entirely. On or about December 3, Sarno called Scarlett and asked for his job back. Scarlett suggested that he call Evangelista and tell him that he would sign something to come back to work. He also told Sarno that he would try to get him, Kathryn (Pettis) Mogan, and Warren reinstated.[9] Sarno called Evangelista immediately, identified himself over the phone, and asked Evangelista to give him his job back. Evangelista's reply was, ''I had to do what I had to do.'' Sarno said he understood but he still wanted his job back. Shortly thereafter, Evangelista's cousin, Anthony Patrizio, the Respondent's secretary-treasurer, came on the phone and asked Sarno what he could do for him. Sarno repeated his earlier request for reinstatement. Patrizio suggested to Sarno that he sign a document stating that he had been pressured into joining the union, have it notarized, and give it to Scarlett for transmission to New York. Patrizio added that, when the document arrived, he would see what he could do for Sarno. With that statement the conversation came to an end.[10]

On Monday, November 30, Scarlett called Mogan at her home shortly before she was scheduled to report to work to tell her that Evangelista had closed the terminal and that the only thing that would remain open would be the office. He suggested that she come in and retrieve her personal belongings, adding that her check would be available in a week. A week later, Mogan came to the office with Sarno to pick up her check. On that occasion, Scarlett told her that he wished that she had come to see him first before making such a ''drastic decision.''

Lloyd's discharge was as abrupt as were all the others. On the afternoon of November 30, Scarlett phoned him at his home and told him that the Company had no further need for his services. Scarlett went on to say that the terminal was being closed and that Lloyd could pick up his paycheck the following week. No reason was offered for the discharge. On the same afternoon, Scarlett phoned Dearden and told him, ''We no longer need your services. Sumo [is] shutting down. There [will] be nothing but office help now.'' When Dearden went to the terminal the following week to pick up his paycheck, Scarlett asked him if he had heard anything from the Union. Dearden replied in the negative and left. Scarlett also phoned Rea on November 30 and told him that Evangelista had closed up the Boston operation. He informed Rea that employees could collect unemployment compensation and could come in the following week to pick up their paychecks.

In fact, the Boston operation has not been entirely closed. The Respondent maintains the same warehouse that it used before the layoffs took place. However, it operates on a month-to-month tenancy rather than on the basis of a yearly lease and is currently about 3 months behind in its rent. Traffic between Boston and New York has been shifted to New York-based drivers who drive about 15 to 20 runs a week, approximately the same number of round trips which Boston drivers handled before the layoff. Local driving in Boston has been subcontracted to another firm or assigned piecemeal to New York drivers and warehouse work formerly performed by Boston employees is handled by New York drivers when they arrive at the Boston terminal. Employees of customers are expected to load trucks in Boston when they arrive at the customer's facility. Evangelista testified that, following the Boston layoff, he hired two or three additional drivers in New York. The dispatching function formerly performed in Boston is now performed by New York dispatchers. Scarlett and one office clerical employee who had been on the payroll before the layoff are still employed. In addition, the Boston office hired three customer service representatives whose jobs include informing customers of pickups and deliveries and answering inquiries as to the location of freight.

C. *Analysis and Conclusions*

1. Independent violations of Section 8(a)(1)

The Respondent herein violated Section 8(a)(1) of the Act by the following acts and conduct:

[9] Later, Scarlett retracted his offer, telling Sarno that he was afraid that these employees would go union if they came back to work.

[10] Patrizio did not testify at the hearing, so Sarno's version of this conversation stands undenied on the record.

(a) On November 30, Scarlett asked Warren over the phone, as a preliminary to discharging him, whether or not Warren signed a union card. Warren replied that he had done so. Within 10 minutes he was fired. Such a question constitutes coercive interrogation in violation of Section 8(a)(1) of the Act.

(b) On or about November 22, Scarlett asked Sheehan if he had heard any rumors about the Union. He repeated the question to Sheehan on three different occasions during the same afternoon, receiving on each occasion a negative reply. Each of the questions constitutes coercive interrogation within the meaning of Section 8(a)(1) of the Act.

(c) During the first of these questionings, Scarlett told Sheehan that he had received word from the New York office that someone in the New York office had heard that Boston employees were engaging in union activities. Such a statement constitutes the creation of an impression that union activities of employees were a subject of company surveillance and violates Section 8(a)(1) of the Act.

(d) During one of his conversations with Sheehan, Scarlett told Sheehan that Tony Evangelista would shut down the operation immediately if it went union. Such a statement is an illegal threat and a violation of Section 8(a)(1) of the Act.

(e) Later on in the same afternoon, Scarlett asked both Rea and Sheehan if either one of them had heard any rumors about union activities. He reiterated the question when both of them replied in the negative. (''Are you sure you haven't heard anything?'') Such questioning constitutes more illegal interrogation in violation of Section 8(a)(1) of the Act. When Scarlett asked them the same question ''off the record,'' he again violated the same section of the Act.

(f) Scarlett then told Sheehan and Rea that Tony Evangelista would close down the operation ''in a minute'' if a union came in. Such a statement constitutes an illegal threat in violation of Section 8(a)(1) of the Act.

(g) On November 25, Scarlett asked Sarno if Sarno had heard anything about a union coming into the terminal and received the usual ''no'' as an answer. Scarlett also asked Sarno if the latter had signed a union card and received another negative answer. Such interrogation constitutes a violation of Section 8(a)(1) of the Act.

(h) During his conversation with Sarno, Scarlett told Sarno that he wished ''you guys'' would have come to see him first and ''none of this would have happened.'' He mentioned that he had approached Evangelista 2 weeks' earlier to try to get a pay raise for Boston employees. Such a statement constitutes an offer to adjust grievances in the face of an organizing drive with an implied promise that such grievances would be remedied, and is a violation of Section 8(a)(1) of the Act.

(i) When Scarlett told Sarno during their conversation that ''Anthony would shut the doors and turn the operation around,'' he made an illegal threat in violation of Section 8(a)(1) of the Act.

(j) When Scarlett asked Kathryn (Pettis) Mogan if she had heard anything about the Union, he was again violating Section 8(a)(1) of the Act by engaging in illegal interrogation, as he did in his further question to her asking whether she had signed a union card.

(k) When Scarlett told Mogan that ''Tony would never go for it,'' that a union would never be allowed inside the terminal, and that ''Tony'' would close the terminal if unionization ever took place, the Respondent was guilty of an illegal threat in violation of Section 8(a)(1) of the Act.

(l) The Respondent illegally solicited grievances with a view toward adjustment when Scarlett told Mogan that he wished that she had come to see him before signing a card.

(m) Scarlett then repeated essentially the same scenario with Lloyd. He illegally interrogated Lloyd by asking him if he had heard any union talk and by asking him if he had signed a card, all in violation of Section 8(a)(1) of the Act.

(n) The Respondent illegally created the impression that union activities were a matter of company surveillance when Scarlett told Lloyd that he was the only employee who had been truthful when asked if he had signed a union card.

(o) Respondent engaged in illegal interrogation when Scarlett asked Dearden if he had signed a card. His inquiry was not preserved from the taint of illegality by Scarlett's followup statement to Dearden that ''you don't have to answer that if you don't want to but I don't want you to lie to me.''

(p) Respondent again illegally solicited grievances by Scarlett's statement to Dearden that he did not blame him for going to the Union in order to secure additional benefits but he wished that Dearden had come to see him first.

(q) When Scarlett suggested to Sarno that Sarno might be able to get his job back by signing something and that he would try to get him reinstated along with Mogan and Warren, the Respondent was illegally attempting to induce employees to withdraw from the Union by promising benefits. Such action violated Section 8(a)(1) of the Act.

(r) When Patrizio told Sarno that, if he signed a notarized statement to the effect that he had been forced to join the Union, Patrizio would try to do something for him, the Respondent was illegally attempting to induce employees to abandon union activities by promising benefits. Such action violated Section 8(a)(1) of the Act.

2. The discharge of seven Boston-based employees on November 30

The action of the Respondent in discharging seven drivers, dispatchers, and a warehouseman in Boston on November 30, without giving any of them any reason for its action must be evaluated against the background of overt threats and other coercive tactics found above. Among the many things which Scarlett told employees when he was investigating their union activities was that Evangelista would discharge them and close the terminal if he found out that employees were trying to unionize. In substantial part that is just what Evangelista did within a few days after these remarks were uttered.

In the face of such compelling evidence, Respondent maintains that the discharges here in question were prompted solely by economic considerations, namely the desire of the Respondent to downsize its entire operation in light of actual or impending deficits. Respondent points out that the size of the Boston segment of its operation had declined materially since it bought out Scarlett's business in 1989. There were between 20 and 22 employees in Boston at that time but only about 9 employees, plus a few part-timers, on November 30 when the discharges were effectuated. Respondent placed evidence in the record that billing from the Boston office had declined over a long period of time. For instance, its monthly billing in 1989 ranged from $90,000 to $154,000.[11] The Boston billing for 1992, up to the time of the November 30 discharge, ranged from $41,000 to $69,000.

However, the Boston billing figures included only the Boston-to-New York traffic. The New York-to-Boston traffic was separately billed and those figures are not in evidence. Hence a decline in Boston billing figures can provide no basis for any assertion that the Boston terminal, viewed as a separate operation, had become unprofitable. The discharges which took place on that date marked the first time in its history that the Boston terminal discharged or laid off any employee for an asserted economic reason. In the past, the Respondent's downsizing took place gradually by attrition; moreover, it occurred from time to time that the Boston terminal found itself understaffed so Scarlett, with Evangelista's permission, hired new employees. Most of the individuals who were terminated on November 30 had not worked for Scarlett throughout the entire time since the Respondent's takeover early in 1989 and had been hired locally to fill vacancies.[12]

Number of Truck Runs

	Boston to New York	*New York to Boston*	*Total*
September 1992	94	93	187
October	97	96	193
November	79	86	165

In calendar year 1992, Respondent's gross sale was down in comparison with the previous year but not precipitously so. Federal tax returns in evidence show that gross sales for 1991 were $9286 million as compared with $7300 million for the following calendar year and ordinary income had shrunk from $59,314 to a reported loss on the 1992 return of $50,309. This loss, however, occurred only after payment of compensation to Evangelista, the Respondent's only officer, of $420,000 in 1992, down from $570,000 in the previous year. While the Respondent's economic trend was definitely downward, it should be remembered that, according to New York State income tax returns in evidence, between 81 and 84 percent of the Respondent's income was derived from New York sales and taxable in New York, but there is no evidence that the Respondent's tougher financial times resulted in any mass layoffs in New York. To the contrary, as noted above, two or three new drivers were hired in New York to handle the runs formerly driven by Boston drivers.

To explain the timing of the November 30 discharges, Respondent placed in evidence a letter written to Evangelista by his accountant, David Nuzzolo, who is also Evangelista's cousin. The letter read:

> Dear Tony,
>
> I just wanted to reinforce my concerns about the company's financial condition as we discussed yesterday while reviewing the financial data.
>
> As discussed, the company current liabilities are greater than the current assets. This indicates a potential problem for the company to pay its current obligations. It seems, however, that this trend is increasing, and that billpaying ability is getting harder and harder. One way to help relieve this is to relieve the company of unnecessary weekly and monthly fixed cost, such as overhead and payroll.
>
> We were discussing the possibility of cutting rental expense by moving the New York operations to a smaller, more efficient space. As you said, with the advent of the new customs program, a large warehouse is no longer necessary. If you reduce your rent, not only

[11] Respondent asserts that its business is seasonal. It experiences a slump about Christmas time each year because purchases and shipments intended for the Christmas trade have been completed a month or so in advance of the holiday. Business is slow in the spring, begins to pick up in the summer, and is comparatively brisk in the fall. However, as the monthly statistics demonstrate, the spread between a traditionally busy month and a traditionally slow month is not great and there have been variations in certain years which do not follow this pattern.

[12] The number of truck runs between New York and Boston during the last 3 months of the operation of the Boston terminal provide no basis for the assertion that the Boston terminal itself was becoming a money-losing proposition. Respondent's data placed in evidence reveal the following information:

The slight decline in November was certainly no more than what might be anticipated by the seasonal nature of the business described by Respondent's witnesses.

> here but possibly at other locations, you will feel the relief almost immediately.
>
> Through my inquiries, I have been made to understand that trucks have not been running as efficiently as they could be. You seem to be confident, however, that with your direct intervention, this problem can be resolved.
>
> In addition, I hear dissatisfaction about the inefficiency of the Boston operation. It seems that Boston is unnecessarily duplicating operations within itself (two dispatchers where New York has only one), and with New York (trucks coming back to New York empty). I also might remind you that employee expenses are generally higher in Boston (unemployment insurance, workman's comp, etc.). As we discussed, the financial data seems to bear this out; payroll is definitely inflated compared with the other operations. I would like to reiterate that this is one area that needs attention.

In explaining his precipitous action on November 30, Evangelista testified that he had been discussing with Scarlett the trimming, and possibly a closing, of the Boston operation for a long time. He had also discussed with the landlord the possibility of its taking over the warehousing operation. The Respondent, however, never negotiated any leasing or other warehousing arrangement before the November 30 discharges took place. This proposal, however, would only eliminate one job, whereas the Respondent eliminated seven. Respondent had already adjusted the Boston dispatching operation by putting late night calls to the Boston terminal on call-forwarding so they would be answered in New York.

Evangelista testified that he did not make up his mind to discharge the seven discriminatees until the week before the action was taken and had withheld his decision from Scarlett until the last minute for fear of possible sabotage. There is, however, no documentation whatsoever of this self-serving assertion.[13] The week in which Evangelista assertedly decided to discharge the discriminatees was the same week during which Scarlett was actively interrogating employees concerning their union activities and making repeated threats that Evangelista would close the plant if it became unionized. It was also the week during which Scarlett told employees that there had been rumors in New York that union activity was taking place in Boston. While Evangelista testified that he knew nothing of union activity until Friday, November 27, when the representation petition was served upon the Boston terminal by the Board, I discredit this testimony.

It is undisputed that both Evangelista and Scarlett were well aware of the union activity on November 30 when the discharges were effectuated. Evangelista testified that, in the face of his economic problems, he had planned to wait until after the first of the year before taking any action in Boston and was going to give any employee laid off 2 months' severence pay and the opportunity to work in New York. He did neither and admitted on the stand that he had changed his mind because of the filing of the representation petition. With full knowledge of the unionization effort and against a background of intense antiunion animus, including threats to close if a union came into the terminal, the Respondent herein eliminated and transferred out, either to its New York location or to other companies, most of the functions of the Boston terminal and discharged all of its Boston drivers, dispatchers, and warehousemen. Notwithstanding economic difficulties of long standing, it refrained from taking this action until it learned of the unionization threat. By so doing, the Respondent violated Section 8(a)(1) and (3) of the Act. By failing to offer discharged employees either severance pay or an opportunity to relocate to New York because the Union had filed a representation petition, the Respondent also violated Section 8(a)(1) and (3) of the Act.

In order to accomplish the removal of union adherents from its payroll, it was necessary for the Respondent to transfer bargaining unit work elsewhere—warehouse work to employees of its landlord, local driving work to an outside contractor, and the over-the-road driving work to New York-based employee drivers and owner-operators. By transferring unit work outside the bargaining unit in order to defeat an organizing drive and to effectuate the discharge of unit employees, the Respondent herein violated Section 8(a)(1) and (3) of the Act.

When both Scarlett and Patrizio told Sarno that he might be able to get his job back if he renounced his union membership and signed a document stating that he was coerced into signing a union card, they were discouraging union membership by conditioning reinstatement upon abandoning such membership in violation of Section 8(a)(1) and (3) of the Act. *Jaybill Steel Products*, 258 NLRB 1180 (1981).

3. The refusal to bargain with the Union

a. *The scope of the bargaining unit and the Union's majority status*

The General Counsel alleges that the appropriate unit for collective bargaining is:

> All full-time and regular part-time employees, including drivers, driver-warehousemen, warehousemen, and dispatchers employed by Respondent at its East Boston, Massachusetts, facility, but excluding office clerical employees, managers, guards, and supervisors as defined in the Act.

The Respondent insists that any appropriate unit should include at least its New York operation and preferably nonsupervisory employees located at its Secaucus, Raleigh-Durham, and Atlanta offices. If the unit was limited to the Boston operation, the seven cards admitted into evidence would demonstrate overwhelming union majority status. In the event that other locations were included, these cards would fall far short of constituting the Union as the bargaining agent.

There is a specific reference to ''plant unit'' in Section 9(b) of the Act which has prompted the Board to invoke a presumption of appropriateness for single-plant units over multiplant units. *Beaumont Forging Co.*, 110 NLRB 2200 (1954). This presumption has long been applied to manufacturing operations. *Dixie Belle Mills*, 139 NLRB 626 (1962); *Penn Color, Inc.*, 249 NLRB 1117 (1980); *J. Ray*

[13] Scarlett testified that Evangelista told him, when they were discussing the financial plight of the Company, that he wanted to try to ''get through the holidays,'' meaning that the Boston terminal would not be shut down until after January 1, 1993, rather than on November 30. I discredit this unsubstantiated, undocumented, and uncorroborated testimony as well.

McDermott & Co., 240 NLRB 864 (1979). The same presumption has also been repeatedly applied to similar issues arising in trucking operations. *Davis Transport, Inc.*, 169 NLRB 557 (1968); *Groendyke Transport, Inc.*, 171 NLRB 997 (1968); *Alderman Transport Lines*, 178 NLRB 122 (1969); *Bekins Moving & Storage Co. of Florida*, 211 NLRB 138 (1974); *Bowie Hall Trucking*, 290 NLRB 41 (1988); *Safety Carrier, Inc.*, 306 NLRB 960 (1992). Accordingly, it is incumbent upon the Respondent, not the General Counsel or the Charging Party, to demonstrate why terminals other than the Boston location should be included in the bargaining unit involved in this case. It has failed in meeting this burden.

There has never been any bargaining history at any of the Respondent's terminals which would aid the Respondent in overcoming the presumption which faces it. Geographical distance or proximity is one of the factors involved in a multiplant determination. In this case, the New York and Boston terminals are over 200 miles apart and the Secaucus, Raleigh-Durham, and Atlanta offices are further still from Boston. Until the events of November 30 took place, all Boston drivers were under the direct daily control of Scarlett and the dispatchers employed in Boston. They reported daily (or every other day) to the Boston terminal and were scheduled to work either by Scarlett or one of his subordinates in the Boston office. If an employee needed time off or could not report because of illness or because of interference by virtue of duties at other jobs, it was Scarlett who granted or denied permission for absences, and it was the Boston terminal's responsibility to find a substitute, either another regular driver, a substitute on its list of Boston part-time drivers, or possibly by asking for help from New York. Boston drivers were locally hired and locally domiciled, as are New York drivers. While Scarlett had to get permission from New York to add to his staff, it was he who selected a job applicant and put him on the payroll. His requests for hiring authority were routinely honored.

Boston drivers were a separate and distinct group of locally domiciled employees, all of whom were locally recruited. They had their own seniority listing which the Company observed, even though it was not under any contractual obligation to do so. Boston drivers were paid on a different basis from New York drivers. They were compensated by the trip,[14] whereas company drivers from New York were compensated by the hour whenever they made a Boston run and by the mile when they drove from JFK to points south. Owner-operators were always paid on a mileage basis whenever they drove. Boston dispatchers and New York dispatchers talked with each other from time to time over the phone, but each had separate rosters of drivers to whom daily assignments were made. Boston drivers did not receive holiday pay, although there is testimony in the record that New York drivers received holiday pay on federally recognized holidays. New York drivers received 5 days of sick leave per year while, in Boston, the granting of any sick leave was discretionary with Scarlett. The same disparity existed relative to paid vacations. There was no interchange between Boston-based and New York-based drivers if the word ''interchange'' is used in a proper sense, and certainly there was no ''interchange'' between nondriving employees at either location in any sense of the word. New York drivers were never relocated to Boston to drive out of Respondent's Logan Airport terminal under Boston wages and working conditions, nor were Boston drivers ever relocated to New York to operate out of JFK under New York wages and working conditions. Boston drivers never took trips from JFK to points south. Statistics in the record for the 3 months prior to the November 30 layoff show that the Respondent transported 270 loads from Boston to JFK. Of this number, some 265 loads (including 21 empty or ''dead-head'' loads) were driven by Boston-based drivers and only five by New York-based drivers. With regard to trips from JFK to Boston, the Respondent made 277 trips during this period of time. Of this number, some 144 were driven by Boston-based drivers and 33 by New York-based employee drivers. Filling in by New York-based drivers in an essentially Boston-based operation—a practice normally reserved for weekends—does not constitute interchange, especially in light of the fact that New York drivers were operating under orders from a New York dispatcher and under New York-determined wages.[15] The contact between New York drivers and Boston drivers with employees employed at a terminal other than their own was minimal and was limited to obtaining freight for a return run on most occasions. Boston drivers had their instructions relative to pickups at JFK and freight on the return run before leaving Boston. Such incidental contact does not constitute ''interchange'' and does not give rise to a community of interest necessitating the creation of a multiplant bargaining unit. In light of these factors, it is clear that a unit of regular full-time and regular part-time drivers, dispatchers, and warehousemen, with the usual exclusions, employed by the Respondent at its East Boston, Massachusetts facility, constitutes a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.[16]

The parties stipulated that the cards of the seven discriminatees were valid and that the card signers were all members of the Boston unit. They went on to stipulate that the unit should include only those seven discriminatees. I am not foreclosed from adding to that unit. Regular part-time employees are also members of a regularly constituted bargaining unit and there is evidence that at least one such driver, Kenny Davis, regularly drove for the Respondent each week. Accordingly, I will include him in the unit as well. Since the Union had valid cards from seven of the eight unit employees on or after November 25 when it filed its rep-

[14] When making pickups, either at Logan or at JFK, they received so-called ''pedal time,'' i.e., compensation calculated on an hourly basis.

[15] Eighty New York-to-Boston runs during the months of September, October, and November 1992, were made by owner-operators. Since these drivers were not company employees and must be excluded from any bargaining unit, however drawn, their activities cannot serve as a factor in determining whether a single-terminal or multiterminal bargaining unit is appropriate.

[16] In its brief, the Respondent urges that a finding of appropriateness for an overall unit be made on the basis of such factors as centralized truck maintenance by the Respondent's lessor in Brooklyn, centralized purchasing and payroll preparation, centralized billing of customers, and centralized control of price quotations and customer credit approval. While such factors might be relevant and material if the issue before the Board were one of single versus joint employer status, they have no bearing on the appropriateness of a unit designed for the purpose of collective bargaining.

resentation petition and sent its bargaining demand, I conclude that, from that day forward, it has been the duly designated collective-bargaining representative of the Respondent's Boston employees.

b. *Gissel remedy*[17] *and other 8(a)(5) violations*

The General Counsel and the Charging Party have requested, *inter alia*, a so-called *Gissel* remedy which would require the Respondent to recognize and bargain with the Union as the exclusive collective-bargaining representative of its Boston-based drivers, dispatchers, and warehousemen. In this case, the Respondent engaged in a campaign of intimidation and coercion of its employees which included threats of discharge and threats to close the business, as well as wholesale interrogation of employees concerning their union activities and the union activities of others. This campaign was climaxed by the discharge of almost all of the bargaining unit within days of the receipt of a representation petition and a demand for recognition. It is hard to imagine any conduct on the part of an employer which could more thoroughly decimate an organizing drive and more surely render Board election meaningless. The lingering effects of such conduct will surely poison the atmosphere in which any election could be held. The Board and the First Circuit have issued *Gissel* orders and decrees to remedy similar conduct and such an order should be issued here and applied to all conduct occurring on or after November 27. *NLRB v. Matouk Industries*, 582 F.2d 125 (1st Cir. 1978); *Eastern Maine Medical Center v. NLRB*, 658 F.2d 13 (1st Cir. 1981).

On November 30, when the Respondent discharged seven unit employees, assertedly for economic reasons, it was duty bound to recognize and bargain collectively with the Union concerning wages, hours, and terms and conditions of employment of its unit employees. Part of that duty included the obligation to refrain from taking unilateral actions which must affect these matters and, before taking any contemplated action, to notify the Union and offer to bargain with it concerning its proposed actions. The Respondent made no gesture in this regard before firing its Boston crew. Accordingly, by discharging employees without offering the Union an opportunity to bargain over such action and without bargaining, upon request, over such action, the Respondent violated Section 8(a)(1) and (5) of the Act. I so find and conclude.

The same rationale applies to the transfer of bargaining unit work outside the unit. As found above, this transfer violated Section 8(a)(3) of the Act because it was discriminatorily motivated. The transfer, however, also violated Section 8(a)(1) and (5) of the Act because the transfer which took place on and after November 30, 1992, of unit work was a mandatory subject of bargaining and was subject to the same requirements of advance notice to the Union and opportunity for negotiations.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record herein considered as a whole, I make the following

[17] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

CONCLUSIONS OF LAW

1. Sumo Container Station, Inc. d/b/a Sumo Airlines is now and at all times material has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Local Union No. 25, affiliated with the International Brotherhood of Teamsters, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time employees, including drivers, driver-warehousemen, warehousemen, and dispatchers employed by the Respondent at its East Boston, Massachusetts facility, excluding office clerical employees, managers, guards, and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. Since on or about November 25, 1992, the Union has been the exclusive collective-bargaining representative of the employees employed in the unit found appropriate in Conclusion of Law 3 for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing to recognize and bargain collectively with the Teamsters Local Union No. 25, affiliated with the International Brotherhood of Teamsters, AFL–CIO as the exclusive collective-bargaining representative of the employees employed in the unit found appropriate in Conclusion of Law 3; by unilaterally discharging seven unit employees without first notifying the Union and offering to bargain collectively concerning such discharges; and by transferring unit work without first notifying the Union and offering to bargain collectively concerning such transfers, the Respondent violated Section 8(a)(5) of the Act.

6. By discharging Joseph M. Warren, Dennis P. Sheehan, Matthew Sarno, Kathryn Pettis Mogan, Charles Lloyd, Ronald Dearden, and Stephen Rea because of their membership in and activities on behalf of the Union; by transferring bargaining unit work in order to discourage membership in the Union; and by conditioning reinstatement upon abandonment of union membership; by failing to pay severance pay to employees and failing to offer them employment at another facility, the Respondent violated Section 8(a)(3) of the Act.

7. By the acts and conduct set forth above in Conclusions of Law 5 and 6; by coercively interrogating employees concerning their union activities and the union activities of other employees; by telling employees that it would be futile for them to engage in union activities or to select a collective-bargaining representative; by telling employees that reinstatement was impossible because they had engaged in union activities; by threatening to close the terminal and to discharge employees because they had engaged in union activities; by informing employees that the terminal had in fact been closed because they had engaged in union activities; and by soliciting grievances during the course of a union campaign with a view toward adjusting them, the Respondent herein violated Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices have a close, intimate, and substantial effect on the free flow of commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent herein has engaged in certain unfair labor practices, I will recommend that it be re-

quired to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. Since the independent violations of Section 8(a)(1) of the Act found herein are repeated and pervasive, and evidence on the part of this Respondent an attitude of total disregard for its statutory obligations, I will recommend to the Board a so-called broad 8(a)(1) remedy designed to suppress any and all violations of that section of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979). The recommended Order will also provide that the Respondent be required to offer to Joseph M. Warren, Dennis P. Sheehan, Kathryn Pettis Mogan, Charles Lloyd, Ronald Dearden, and Stephen Rea full and immediate reinstatement to their former or substantially equivalent employment and to make them whole for any loss of earnings which they may have sustained by reason of the discriminations practiced against them, in accordance with the *Woolworth* formula[18] with interest at the rate prescribed by the Tax Reform Act of 1986 for the overpayment and underpayment of income tax. *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent objects to a *Gissel* remedy on the basis that the Board's traditional remedy, i.e., a representation election, is appropriate in this case. It also objects to a restoration remedy requiring the Respondent to reopen its Boston facility and rehire the employees who were discharged on November 30, 1992. The net effect of adopting both of these arguments would be to leave the Regional Office with the duty of conducting an election in a bargaining unit with no employees. I reject both arguments.

In the present case, the Respondent argues that it would be ''unduly burdensome''[19] to require it to reopen the Boston terminal and rehire the seven employees it summarily discharged on November 30. To be precise, the Boston operation does not need to be ''reopened'' since it was never completely closed and has continued to do business at the same facility since the events here in issue occurred. Respondent claims that the Boston operation was a loss leader in a business which suffered a net operating loss of $150,000 in 1992 and argues that it would be unduly burdensome to require it to continue to maintain such a losing operation. This argument ignores the fact that the Respondent's New York operation constitutes between 81 and 84 percent of the Respondent's activity, if New York State income tax returns are to be believed, and also ignores the fact that the $150,000 operating loss in 1992 arose only because the Respondent's owner and sole stockholder chose to pay himself a salary of $420,000. While efficiencies might well be introduced at every phase and location of the Respondent's business, blame for a 1-year operating loss, noted above, can hardly be assigned exclusively to the Boston operation.

Unlike the cases cited by the Respondent in support of its argument, restoration in this case would involve no relocation expenses for employees and no investment of capital in order to reopen. Respondent is still paying the same rent for the same facility today as it was in 1992, notwithstanding the argument advanced herein that this expenditure is part of the reason why a reopening order would be burdensome. Respondent's major capital is its trailers, which are hauled back and forth from New York to Boston on a daily basis. Its rolling stock is rented. The fact that Massachusetts assertedly has higher rates for workmens' compensation and unemployment compensation benefits is no reason to reject a restoration remedy since this fact (if it is a fact) was equally true throughout the Respondent's tenure in Boston and was no different at the time the Respondent chose to dismantle its Boston bargaining unit for discriminatory reasons. I have discredited Evangelista's statement—made without any documentary evidence or other reliable corroboration—that he would have closed the Boston operation on January 1, even if the Union had not filed a representation petition. Statements made by his principal supervisor in Boston to various employees belie this assertion emphatically.

What is before the Board in this case is a partial closing of an operation which can be expanded and revived as easily and as quickly as it was dismantled. The so-called closing herein is analogous to an old fashioned runaway shop. It was an effort which was facilitated by the mobility and flexibility of the trucking industry and presents the type of unfair labor practice for which the Board has ordered restoration remedies for many years. See *A. G. Boone Co.*, 285 NLRB 1070 (1987), and cases cited therein at 1087, enf. 863 F.2d 946 (D.C. Cir. 1988), cert. denied 490 U.S. 1065 (1989). I have no reluctance to recommending it here. *Direct Transit*, 309 NLRB 629 (1992); *Statler Industries v. NLRB*, 649 F.2d 902 (1st Cir. 1981).

In addition to the other remedies discussed above, the Respondent will be required to post the usual notice advising its employees of their rights and of the results in this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, Sumo Container Station, Inc. d/b/a Sumo Airlines, Boston, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees concerning their union activities and the union activities of other employees.

(b) Telling employees that it would be futile for them to engage in union activities or to select a collective-bargaining representative.

(c) Threatening to close the terminal or to discharge employees because they had engaged in union activities.

(d) Telling employees that it would be impossible for them to obtain reinstatement because they had engaged in union activities.

(e) Informing employees that the terminal had in fact been closed because they had engaged in union activities.

(f) Soliciting grievances in the course of a union campaign with a view toward adjusting them.

(g) Discouraging membership in or activities on behalf of Teamsters Local Union No. 25, affiliated with the International Brotherhood of Teamsters, AFL–CIO, or any other

[18] *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

[19] This is the phrase which the Board adopted in *Lear Siegler, Inc.*, 295 NLRB 857, 861 (1989), to determine the propriety of restoration remedies.

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

labor organization by discharging employees, transferring bargaining unit work to others outside the bargaining unit, conditioning reinstatement upon withdrawing membership from the Union, failing to pay employees severance pay or failing to offer them employment at another facility, or by otherwise discriminating against them in their hire or tenure.

(h) Refusing to recognize and bargain collectively in good faith with Teamsters Local Union No. 25, affiliated with International Brotherhood of Teamsters, AFL–CIO as the exclusive collective-bargaining representative of its Boston-based full-time and regular part-time drivers, warehousemen, and dispatchers, exclusive of office clerical employees, managers, guards, and supervisors as defined in the Act.

(i) Unilaterally transferring bargaining unit work to others outside the bargaining unit or unilaterally discharging bargaining unit employees.

(j) By any other means or in any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Offer to Joseph M. Warren, Dennis P. Sheehan, Matthew Sarno, Kathryn Pettis Mogan, Charles Lloyd, Ronald Dearden, and Stephen Rea full and immediate reinstatement to their former or substantially equivalent employment, without prejudice to their seniority or to other rights previously enjoyed, and make them whole for any loss of pay or benefits suffered by them by reason of the discriminations found herein, in the manner described above in the remedy section.

(b) Reestablish the entire business operations of the Respondent at East Boston, Massachusetts, and restore the work which was formerly performed at that location before bargaining unit employees were terminated.

(c) Recognize and bargain collectively, upon request, with Teamsters Local Union No. 25, affiliated with International Brotherhood of Teamsters, AFL–CIO as the exclusive collective-bargaining representative of all full-time and regular part-time drivers, warehousemen, and dispatchers employed at its East Boston, Massachusetts terminal, exclusive of office clerical employees, managers, guards, and supervisors as defined in the Act.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its East Boston, Massachusetts facility copies of the attached notice marked ''Appendix.''[21] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''